Central Law Journal.

ST. LOUIS, MO., JANUARY 15, 1904.

WHETHER INSECTS ARE FERAE NATURAE OR DOMESTIC ANIMALS WITHIN THE PROTECTION OF A STATUTE PREVENTING CRUELTY TO ANIMALS.

The whole gamut of animate and inanimate existence is reached by the lawyer of general practice. He must be in touch with all sources of knowledge and not be surprised at the most unusual questions which may abruptly confront him and demand an answer. Just now the judiciary of France are wrestling with the question whether a house-fly is a domestic animal or a wild beast.

The question happened to arise after this manner. The camelots, or street fakirs of Paris, all last summer sold small card board toys, which seemed to possess automatic motion, but were really propelled by the captive flies shut up in the interior. Some sensitive members of the society for the prevention of cruelty to animals took pity on the flies and applied to the courts for an order forbidding the manufacture of the toys. The manufacturers, however, took the ground that the fly was not a domestic animal, but a wild beast, which did not fall within the sphere of the law's protection and the French tribunals are now solemnly cogitating on an effort to determine the legal *status* of the fly.

On a superficial consideration there might seem to be little of importance in a discussion of this question. It might seem more appropriate as a text for a few witticisms perpetrated at the expense of the little insect or of the French judiciary who thus seriously bend to consideration of it. But more mature reflection will recognize something of importance in the subject.

In the first place, is a fly a wild animal? While we have been unable to find any direct adjudication of this particular question, we have no hesitancy in expressing our opinion that it belongs to the class of *ferae naturae* especially in view of the well-known principles determining the classification of animals in this regard. A wild animal is one in a state of nature not subject to the control of man. A domestic animal is described in terms just the converse of those used in this definition. It is quite evident therefore that by the plain terms of the definition itself flies come within the description of wild animals. They are certainly not useful for domestication, are seldom if ever tamed, and are absolutely beyond the control of man. This latter characteristic is well illustrated in the experience of everyone by this little insect's persistent and annoying intrusions upon our personality and the privacy of our homes in spite of our most determined and vicious resistance.

Whether the fact that a fly is a wild animal excepts it from the list of animals upon which cruelty cannot be legally inflicted, depends much upon the particular wording of the statute. The phrase "every living creature" in a statute for instance, would certainly include wild animals in captivity. Waters v. People, 23 Colo. 33, 46 Pac. Rep. 112, 58 Am. St. Rep. 215, 33 L. R. A. 836. So also the word "animal" in its common acceptation includes all irrational creatures, and when used in a statute relating to subject of cruelty to animals, would embrace wild and noxious animals, unless a different meaning is indicated. Commonwealth v. Turner, 145 Mass. 296, 14 N. E. Rep. 130. The phrase, "domestic animals," however, will certainly not include wild animals even in captivity. Aplin v. Porritt (1893), 2 Q. B. 57; Harper v. Marcks (1894), 2 Q. B. 319; *In re* Racey (Canada), reported in 54 Alb. L. J. 252. In this last case cited it was held that the torture of captive lizards or chameleons was not cruelty to domestic animals. In the case of Swan v. Saunders, 44 L. T. Rep. (N. S.) 424, it was held that a parrot was not a domestic animal within the statute relating to cruelty to animals. Grove, J., said: "I do not say that a parrot might not become a domesticated animal when thoroughly tamed and accustomed to the society of human beings, but these were young and unacclimatized birds."

Our conclusion is therefore that where expressly or by necessary intendment or implication a statute relating to the offense of cruelty to animals, refers only to "useful" or "domestic" animals, any pain or torture inflicted on a wild animal will not come within its terms. And that a wild animal in this regard includes those not only in a state of nature but those also in captivity, but not

domesticated. And that in particular, flies, or other insects of a similar kind either in a state of nature or in captivity are within the description of wild animals upon which the offense of cruelty to animals cannot be legally committed.

NOTES OF IMPORTANT DECISIONS.

WILLS—POWER OF A PARALYZED MAN TO MAKE HIS WILL BY OPENING AND SHUTTING HIS EYES.—The case of Ryan v. Ryan, which was an action for probate of a will, and was tried by Mr. Justice Barton last week, disclosed an extraordinary amount of ingenuity on the part of the solicitor who had received instructions from the deceased and had prepared the will. The deceased, a man named Ryan, had been struck down by paralysis and deprived of nearly all power over his muscles. He was unable to speak or to move his hands or arms, but, as it was proved, his brain was unaffected and his intellect was clear. He still had power to open and shut his eyes, and the solictor arranged that the closing of his eyes was to mean an affirmative answer to a question, and the keeping them open a negative answer. By means then of an elaborate and exhaustive series of questions, which the testator answered in that manner, the solicitor extracted his wishes and prepared the will, and the testator assented to its contents in the same way. The will was contested by a legatee under a former will. Mr. Justice Barton held that the will was properly executed and decreed probate. He considered, however, that the matter was one in which investigation was reasonable, and he gave the opposing party his costs out of the estate.—*Law Times* (*London*).

TRIAL AND PROCEDURE—THE THEORY OF A CASE AND ITS IMPORTANCE.—Some time ago we called attention to the importance of this subject from the standpoint of good advocacy. 57 Cent. L. J. 461. It may not be amiss to mention that the rule there announced is good law as well. The recent case of De Raismes v. De Raismes (N. J.), 56 Atl. Rep. 170, holds that where an action on a note is tried on the theory that it was barred unless it was taken out of the operation of the statute by a new promise, plaintiff cannot claim an appeal that, as that note bore interest, it did not become due until actual demand and that therefore the bar of the statute had not fallen. In answer to this argument the court said: "Even if this contention on the part of the plaintiff was sound, it would not now avail him. The case was tried upon the theory that the note was outlawed unless it was taken out of the operation of the statute by the new promise contained in the letters, and the plaintiff's verdict cannot be sustained upon a theory of the law antagonistic to that upon which the case was tried. To do so, upon a rule to show cause, would be to deprive the defendant of her right to have the judgment of the court of last resort upon the soundness of that theory, as applied to the facts of the case.

It will only take a few such experiences of the kind recorded in the case from which we have just quoted, to convince an attorney that it does not pay to rush into the court with a case without first looking over the ground carefully and fixing upon some theory that fits in most accurately with the facts of the case and the law applicable thereto. Under our ridiculously loose methods of pleading which have come about as a reaction from the rigor of common law pleading, an attorney often imagines that all he has to do is to state all the facts and introduce all the evidence he can find without any theory or purpose in its introduction and then insist on that phase of the case that appears most favorable when the smoke of the conflict has cleared away. But no such haphazard methods of litigation are tolerated by respectable courts. A lawyer must carefully consider all the facts in his case before he files suit and determine upon what theory as to the facts seems to furnish the most natural solution of the question at issue and what theory as to the law seems most reasonably and logically to justify a recovery.

THE CONVERSION OF THE DEBT OF A CHILD INTO AN ADVANCEMENT BY THE PARENT.

The settlement of decedents' estates and the distribution thereof and the setting off in severalty of the respective interests of heirs in the real estate of the deceased, are frequently complicated by alleged advancements asserted on the one hand and denied on the other, and many vexed and difficult questions are presented in cases where one party seeks to establish that the ancestor by his declarations or by some positive act converted or intended to convert the debt of one child into an advancement. In order to fully and intelligently discuss the subject of this article it is well enough to deviate briefly to consider some of the general propositions underlying the doctrine of advancements.

An advancement has been defined as "a giving, by anticipation, the whole or a part of what it is supposed a child will be entitled on the death of the party making it."[1] Another definition which emphasizes the distinctions between advancements, gifts and debts is as follows: "An advancement is neither a loan or debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition

[1] Darne v. Lloyd, 3 Am. St. Rep. 123,

that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution."[2] Advancements may consist of either personalty or realty, unless confined by some statute exclusively to one or the other.[3] If any heir or distributee has received any part of his share of his father's prospective estate during the latter's life-time, the same will be deducted from the child's share of what the intestate shall have left at his death, provided such share shall not exceed the amount of the advancement. It is understood, of course, that advancements are not to be charged in such a manner as to revoke, annul or prevent the specific bequests or devises of a will subsequently made.[4] But if money or property is advanced after the making of a will, it may be shown that the donor's intention was to apply the same on a legacy contained in the will. The courts incline to the doctrine of distributing estates, and dividing the intestate's realty among his heirs in such manner as to make as nearly as possible an equal and equitable settlement; and where an advancement is clearly shown to one child, the courts do not hesitate to consider and charge the same against the beneficiary thereof. But, as said by Washburn on Real Property,[5] "in order to its being allowed in estimating the several shares to be received by the heirs or distributees, it must be shown to have been intended as an advancement, by certain forms of proof which the law has prescribed. These rules are not uniform, each state generally prescribing its own rules by statute." The doctrine of advancements is founded in this country wholly upon statute;[6] but out of the great multitude of cases certain general principles have come to be recognized and established. The authorities bearing upon the conversion of debts into advancements are not at all prolific, but the following propositions are supported by ample and respectable authorities:

1. A parent cannot convert an advancement into a debt.[7]

2. He may ordinarily convert a debt into an advancement.[8]

3. The parent cannot, by *ex parte* declarations not communicated to the child, nor agreed to by the latter, convert a debt into an advancement.[9]

4. But he may do so by destroying a note or by writing on the back thereof that it is converted into an advancement, or by doing some other positive act manifesting an intention or purpose to cancel the debt as such and charge the same as an advancement.[10]

The presumption of an advancement arises in a great many cases and that presumption is favored wherever a reasonable foundation is made for the same. But such presumption may be rebutted.[11] If a son fails or refuses to pay his note made to the parent for money advanced by the latter, and the parent destroys the note rather than proceed against the son as the law provides, and gives expression of his displeasure on account of the son's conduct or laches, reason and justice warrant the presumption that the debt so eliminated was converted by the parent into an advancement and not into an absolute gift. Whether the parent intended an advancement is purely a question of fact, and in a great many cases that intention may fairly and logically be inferred from the circumstances surrounding the transaction. So, in Gilbert v. Wetherhill,[12] "where a father furnished money to a son to start in business, taking the son's demand note in return, and the father afterwards, on his death bed, called

[2] *In re* Hall, 14 Ont. 557.

[3] Havens v. Thompson, 23 N. J. Eq. 321; Terry v. Dayton, 31 Barb. (N. Y) 522.

[4] Coleman v. Smith, 55 Ala. 369; Chapman v. Allen, 56 Conn. 152; Arnold v. Haron, 43 Hun (N. Y.), 278.

[5] 2 Washburn on Real Property (2d Ed.), 412; Boon on Real Property, sec. 274; Shaw v. Kent, 11 Ind. 80; Sherwood v. Smith, 23 Conn. 516.

[6] Am. & Eng. Ency. Law (1st Ed.) 216, 220.

[7] Brook v. Latimer, 21 Am. St. Rep. 292, 295; Thompson's Appeal, 42 Pa. St. 345; Cleaver v. Kirk 3 Met. (Ky.) 270; Dudley v. Bosworth, 10 Humph. (Tenn.) 9; Sherwood v. Smith, 23 Conn. 516.

[8] Darne v. Lloyd, 3 Am. St. Rep. 123; Green v. Howell, 6 W. & S. (Pa.) 203; Mitchell v. Mitchell, 8 Ala. 414.

[9] Lawson's Appeal, 23 Pa. St. 85; Dugan v. Gittings 3 Gill (Md.), 138; Bradsher v. Cannady, 76 N. Car. 445; Yundt's Appeal, 53 Am. Dec. 496; Harley v. Harley, 57 Md. 340.

[10] Gilbert v. Wetherhill, 2 Sim & S. 259; Shotwell v. Strubble, 21 N. J. Eq. 31; Darne v. Lloyd, 3 Am. St. Rep. 123.

[11] Grattan v. Grattan, 18 Ill. 167; Dillman v. Cox, 23 Ind. 440; Brunson v. Henry, 39 N. E. Rep. 256; *In re* Willock's Estate, 30 Atl. Rep. 1043; Rhea v. Bagley, 38 S. W. Rep. 1039; Finch v. Garrett, 71 N. W. Rep. 429; Gordon v. Barklew, 6 N. J. Eq. 94; Howard v. Howard, 28 S. E. Rep. 648.

[12] 2 Sim & S. 259.

for and destroyed the note," it was held to be an advancement, and not a debt. It frequently occurs that a parent, intending an advancement, takes the note of the child as a mere memorandum or evidence of such advancement. In Vaden v. Hance,[13] it was held that notes are *prima facie* evidence of a debt, unless it can be shown that they were given simply as memoranda of advancements, or that the father did not intend to collect them. The presumption in favor of a debt where the parent receives the promissory note or bond, or other writing from the child, may be overthrown by parol evidence. So in Brook v. Latimer,[14] the child gave the following promissory note to his father: "On demand I promise to pay to I. J. Brooks, ten thousand dollars, value received this 12th day of June, A. D., 1882. (Signed) Jesse E. Brooks." In that case it was held that the admission of parol evidence tending to show that a promissory note absolute in terms, and given by a child to a parent, was merely intended as between the parties as an advancement by the parent to the child, was not a violation of the rule of evidence which forbids a written instrument to be varied or contradicted by parol.

It is the parent's moral obligation, commensurate with his means, to properly educate his children and prepare them for the responsibilities and duties of life, and money expended to educate, clothe and provide for them such things as are essential to their correct training, in a manner appropriate to their station in life, does not come within the category of advancements;[15] nor do presents, such as jewelry and the like ordinarily amount to advancements.[16] In some states it is expressly provided by statute that moneys or properties used in maintaining and educating a child shall not be deemed an advancement. As for instance it is provided by statute in Indiana that "the maintaining, or educating, or giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement, etc."[17] But the parent's intention is never to be ignored, if possible, and the statute last quoted recognizes that doctrine. So, in the case of Garrett v. Colvin,[18] where a father gave money to his sons to defray the expenses of a university education, with the distinct intention that it was given as an advancement, the court so considered the same though expenses for such education would not ordinarily be so treated.

But when a son is just entering into business independent of the parental roof, or a daughter is just entering into matrimony, and the father desiring to make some substantial provision for starting them in life, such as advancing money,[19] or buying real estate and placing the title in the name of either,[20] or conveying a portion of his real estate to them,[21] the presumption of an advancement arises, and that presumption must be rebutted by the beneficiary. And bonds and promissory notes, given under such circumstances, and left unpaid, or on which no interest has been collected, may be treated as mere memoranda of advancements and not as debts. But a much more complicated and unsettled question arises where a parent loans or advances money to a son who is already living separate from the former and long past his majority, and the latter gives his written obligation as evidence of such indebtedness, and subsequently the son neglects or refuses to discharge the debt and the parent in expressed displeasure of the son's laches tears up the writing or surrenders it to the son and concurrently or subsequently condemns the latter's ingratitude. While it is the general doctrine that a debt cannot be converted into an advancement by the *ex parte* declarations of the parent, not communicated to the child, or without the latter's consent,—yet the authorities maintaining that doctrine clearly do

[13] 1 Head (Tenn.) 300.

[14] 21 Am. St. Rep. 292.

[15] Bradsher v. Cannady, 76 N. Car. 445; Miller's Appeal, 40 Pa. St. 57; Bowles v. Winchester, 13 Bush. (Ky.) 1.

[16] Sandford v. Sandford, 61 Barb. (N. Y.) 293; King's Estate, 6 Whar. (Pa.) 370.

[17] Sec. 2564, R. S. 1901.

[18] 26 So. Rep. 963.

[19] Dwight on Persons and Personal Property, p. 640; Chase v. Ewing, 51 Barb. (N. Y.) 597; Hollister v. Atmore, 5 Jones Eq. (N. Car.) 373; Holliday v. Wingfield, 59 Ga. 206.

[20] Stanley v. Brammer, 6 Blackford (Ind.), 193; Tremper v. Barton, 18 Ohio, 418; White v. White, 12 S. W. Rep. 201; Higham v. Vanosdol, 25 N. E. Rep. 140.

[21] Hatch v. Straight, 3 Conn. 31, 8 Am. Dec. 152; Scott v. Harris, 127 Ind. 520; Jakolet v. Danielson, 13 Atl. Rep. 850.

not apply to those instances in which the child's unreasonable neglect or willful refusal to pay the debt are involved. That rule would seem to apply only to those cases where a *bona fide* indebtedness was created in the beginning, without the intention to constitute an advancement, and subsequently the parent of his own volition, without any provocation or neglect on the part of the child, voluntarily endeavors to convert the debt into an advancement. In those cases, the child may stand upon the original debt, and rebut the attempted advancement. But where willful refusal or unreasonable neglect are involved, and the child has received a considerable sum of money or quantity of property on the faith of a *bona fide* loan, and the parent in disgust or indignation destroys the note, or surrenders the same, without settlement,—it certainly would be an unjust rule to permit the prodigal son to share equally with those who had received nothing in advance, and to declare because the parent's intention to create an advancement out of the canceled debt was not directly communicated to the child or agreed to by the latter, that, therefore, the destruction of the note must be treated as an absolute gift. A doctrine so devoid of justice and equality of distribution would be utterly at variance in spirit and effect with the general principles upon which advancements are based and ascertained.

In Shotwell v. Strubble,[22] it was held that the release of a note held by a father against the son made it an advancement. In Batton v. Allen,[23] it was held that the mere fact that the notes of a son are outlawed is not enough of itself to show an advancement; but that statements of a parent before his decease that he considered the outlawed notes as advancements, being admissions against his interest, were admissible in evidence as bearing upon the question whether the parent intended to convert the defaulted debt into an advancement, or that the same was intended in its incipiency as an advancement, and that the notes were given merely as memoranda. Of the same tenor is the case of West v. Bolton.[24] Adhering to the same logic is the case of *Re* Willocks' Estate,[25] where it appeared that the mortgage, or pretended incumbrance of a child was invalid, and it was held that a court of equity would regard the money loaned as an advancement. Deviating, in a way, from that doctrine is the case of White v. Moore,[26] where it was held that a son's note twenty-four years old, found among the parent's effects, would be considered paid, and that the presumption of payment effectively rebutted any presumption of an advancement. It is manifest, however, that if in that case the evidence had disclosed that the parent, during his life-time, or in his latter years had expressed his displeasure at the son's ingratitude or laches, or there had been circumstances tending to show that the son, taking advantage of parental affection and forbearance, had refused to discharge the indebtedness, a different conclusion would have been reached by the court.

The case of Darne v. Lloyd,[27] maintains the equitable doctrine that the parent may of his own motion and will change debts into advancements, as the proceeding is necessarily against his own interests and subjects the child to no additional burden, but is, in fact, advantageous to the latter. In that case the testator left a will in which occurred the following item or paragraph: "Since the execution of said deed I have advanced the sum of $950 to Leslie Lloyd, and for which I had a deed of trust on a lot of land in Fairfax, which deed I have released to enable him to sell, but which amount is still due from the said Lloyd to me, and which I wish collected of him, and accounted for by him before he shall come into the distribution of my estate. My daughter Louisa, the widow of Samuel Wrenn, is also indebted to me in the sum of $900, advanced to her upon marriage, also the sum of $55, evidenced by the bond of her late husband, Samuel Wrenn, which amount I wish collected and accounted for before she shall come into the distribution of my estate. My daughter Martha is also indebted to me in the sum of $300 which I advanced to her husband, Augustus Wrenn, and which is evidenced by his bond, which amount I wish collected and accounted for before she shall come into the distribution of my estate. When these amounts are collected, my will is that the whole of my estate

[22] 21 N. J. Eq. 31.
[23] 43 Am. Dec. 630.
[24] 23 Ga. 531.
[25] 24 Pitts. L. J. (N. S.) 446.
[26] 23 S. Car. 456.
[27] Darne v. Lloyd, 3 Am. St. Rep. 123.

be equally divided between all of my children and their descendants, including the above named three who are indebted to me; but if they refuse to pay the same, then they are not to have any part thereof, etc." Without entering into a detailed statement of the facts of that case, other than as they appear in the portion of the will quoted, it is sufficient to note this language used by the court therein: "A testator can dispose of his estate by will just as effectually as he can by gift during his life, and, if he pleases, turn a loan into an advancement, or to speak more accurately, require that it may be treated as an advancement, and this the testator has done in effect in this case."

While some of the cases maintain that a debt cannot be converted into an advancement by the *ex parte* declarations of the parent, or without the consent or agreement of the child, yet an analysis of those holdings will readily disclose that they do not logically or in fact apply to cases involving the dereliction or laches of the child, and especially when such laches or dereliction is supplemented with statements made by the parent condemning the ingratitude or default of the child, even though such statements may be *ex parte*, and not communicated to the latter. Where it appears that one child has profited upon the possessions of the parent to the exclusion of other children and the parent has loaned money to that child upon the faith of a *bona fide* indebtedness and the child has willfully or unreasonably delayed or refused payment, the plainest principles of justice require that the subsequent destruction or surrender of the note or written obligation by the parent, after having been overreached and disregarded by the child, should not be construed into an absolute gift, but into an advancement. Gifts are presumably made by virtue of affection or natural love in such cases, and where the child has stigmatized itself with discreditable conduct against the parent, the very purpose and consideration of an absolute gift have disappeared.

It follows from the authorities herein catalogued and commented upon that (1) the courts incline to the doctrine of advancements whenever the same can be supported by sufficient evidence; (2) that the courts seek to maintain an equality of distribution among heirs; (3) that promissory notes and the like, while *prima facie* evidence of debts, may be shown by parol evidence to have been intended as mere memoranda of advancements; (4) that while the parent cannot convert an advancement into a debt for the reason that an advancement of its nature must be irrevocable, yet a parent may of his own volition convert a debt into an advancement, unless the child, being free from laches, default or willful neglect, elects to stand by his original oblitation.

WALTER J. LOTZ.

Muncie, Indiana.

MARTIAL LAW—DUTY OF SOLDIER—HOMICIDE.

COMMONWEALTH v. SHORTALL.

Supreme Court of Pennsylvania, April 17, 1903.

Where a governor of a commonwealth issues a general order calling out the militia to suppress violence and maintain the public peace in a district affected by a strike, it is a declaration in such district of qualified martial law.

Where a member of the militia called out to suppress disorder, without malice, in performance of his supposed duty, and under the order of an officer, commits a homicide, he is excusable unless it was manifestly beyond the scope of his authority, and he must have known that the act was illegal as a man of ordinary understanding.

MITCHELL, J.: A somewhat full statement of the facts will be conducive to the proper understanding of the case.

During the summer of 1902 a strike, beginning with a labor union known as the United Mine Workers of America, spread through nearly the whole of the anthracite coal region in Pennsylvania. As time progressed it was accompanied with increasing disorder and violence on the part of the strikers and their sympathizers, so that threats and intimidation, not only of men, but of their women and children, rioting, bridge burning, stoning and interference with railroad trains, destruction of property, and killing of nonunion workmen, became of frequent occurrence. The communities affected were either in secret sympathy with these acts or lacked the courage to put an end to them. Among the places where the disorder was greatest was Shenandoah, in Schuylkill county. There the police and the sheriff in attempting to preserve the peace were overpowered and beaten by mobs of strikers and several citizens killed. The sheriff having called upon the governor, the latter first ordered out a portion of the militia, and subsequently, on further call, the entire division of the National Guard, on October 6, 1902, by general order No. 39.

Under this order the Eighteenth Regiment, being part of the troops under command of Brigadier General Gobin, was stationed in and near Shenandoah. Several houses occupied by nonunion men had been dynamited and attempts

made upon others. On October 8th, therefore, General Gobin issued the following order: "At 5:30 P. M. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6th, and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guard have been that they shall keep a sentry at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and if any attempt is made to dynamite them, or they are shot at, or stoned, or any suspicious characters prowl around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot, and shoot to kill."

The relator, Arthur Wadsworth, was a private in Company A of the Eighteenth Regiment, in service there, and in the evening of October 8th was posted as sentry in the front yard of the Bucklavage house, just outside the door, with orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due warning, "to shoot, and shoot to kill." About 11:30 o'clock he discovered a man approaching along the side of the road nearest the house, and called, "Halt!" The man continued to advance toward the gate. Wadsworth called again, "Halt!" The man continued to advance. Wadsworth then touched the door, and said, "Corporal of the guard." He then called, "Halt!" and again, "Halt!" The man by this time had opened the gate, and was coming into the yard, when Wadsworth, in accordance with his orders, fired, and the man, whose name was afterwards found to be Durham, fell to the ground dead.

A coroner's inquest was held, and the jury found that "the shooting was hasty and unjustifiable," and recommended that the matter be placed in the hands of the district attorney for investigation. In the meantime, on complaint before a justice of the peace, a warrant had been issued for the arrest of Wadsworth, and after the return of the regiment from service he was arrested at his home in Pittsburg by the respondent, a constable of the borough of Shenandoah. A writ of *habeas corpus* was allowed by the presiding justice of this court, and, the commonwealth not making any charge higher than manslaughter, the relator was admitted to bail pending the argument of the case.

The issue of general order No. 39 by the governor was a declaration of qualified martial law in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United States at all, or, at least, according to the more moderate advocates of that view, not in time of peace. Thus in *Ex parte* Milligan, 71 U. S. 2, 127, 18 L. Ed. 281, it is said in the opinion of the majority of the court: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." But, in the dissenting opinion in the same case, Chief Justice Chase convincingly distinguished three classes of military rule, which are thus summarized by Judge Hare in his lectures on American Constitutional Law (page 930): "Military law, then, consists of the rules prescribed legislatively for the government of the land and naval forces, which, operating both in war and peace, and defined by congress, are an offshoot of the civil or municipal law. Military government is the dominion exercised by a general over a conquered state or province. It is therefore a mere application or extension of the force by which the conquest was effected, to the end of keeping the vanquished in subjection, and, being a right derived from war, is hardly compatible with a state of peace. Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends for its extent, existence, and operation on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens."

Many other authorities of equal rank hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. So far as any of the questions in the present case are concerned, the difference is one of terms rather than of substance, and is material chiefly in regard, first, to the jurisdiction of courts martial or military commissions over citizens not in the military or naval service, nor engaged in recognized war; or, secondly, to the responsibility of officers or soldiers giving or acting under military orders, when not in actual war, to be called to account in the civil or criminal courts. With the first of these matters we are not now concerned, and the second will be discussed in due order.

Order No. 39 was, as said, a declaration of qualified martial law. Qualified, in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open, and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose, it was martial law, with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an

error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in facts exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve and operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the community is held in check by the knowledge and fear of the law, but the overt lawbreaker must be taken into actual custody.

When the mayor or burgess of a municipality finds himself unable to preserve the public order and security, and calls upon the sheriff with the *posse comitatus*, the latter becomes the responsible officer, and therefore the higher authority. So if, in turn, the sheriff finds his power inadequate, he calls upon the larger power of the state to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the state, the governor intervenes as the supreme executive, and he or his military representative becomes the supreme and commanding officer. So, too, if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority, added to his own powers as to military methods.

The resort to the military arm of the government, therefore, means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military, and then have them stand quiet and helpless, while mob law overrides the civil authorities, would be to make the government contemptible, and destroy the purpose of its existence.

The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

"Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and, although ordinarily dormant in peace, may be called forth by insurrection or invasion. War has exigencies that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which, as has been here seen, may warrant the taking of life, and will therefore, excuse any minor deprivation." Hare, Am. Constitutional Law, lect. xlii, p. 924.

"When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or property, the sheriff may call forth the *posse comitatus* and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance, and if loss of life ensues the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding officer. As Lord Mansfield showed in the debate on the Lord George Gordon riots in 1780, soldiers are subject to the duties and liabilities of citizens, although they wear a uniform, and may, like other individuals, act as special constables or of their own motion for the suppression of a mob, and if the staff does not suffice, employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments, and even by some distinguished jurists, because, agreeably to the same great magistrate and the settled practice in England and the United States, they are liable to be tried and punished for any excess or abuse of power, not by the martial code, but under the common and statute law." Hare, Am. Const. Law, lect. xli, p. 906.

This last quotation illustrates and explains the difference in the application of the term "martial law," which has given so much apparent trouble to some of the text-writers. There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable,

after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of parties aggrieved. On this all the authorities agree, and the result flows from the view that martial law in this sense is merely an extension of the police power of the state, and therefore, as expressed by Judge Hare in the quotation *supra*, an "offshoot of the common law, which, though ordinarily dormant in peace, may be called forth by insurrection or invasion." See, Respublica v. Sparhawk, 1 Dall. 357, 1 L. Ed. 174; Mitchell v. Harmony, 13 How. (U. S.) 115, 14 L. Ed. 75; Ford v. Surget, 97 U. S. 594, 24 L. Ed. 1018; and English cases cited in 2 Hare on Const. Law, ch. xli.

In determining the responsibility for such acts the courts proceed upon the principle of the common law as applied in issues of false imprisonment, self-defense, etc., that the acts must be judged by the appearance of things at the time. "It is not less clear that although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less extreme course might have been pursued with safety." Hare, Const. Law, p. 917.

"It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of the facts as they appear to the officer at the time he acted will govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a trespasser." Taney, C. J., Mitchell v. Harmony, 13 How. 115, 14 L. Ed. 75.

And, while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible, for the first and overruling duty is to repress disorder, whatever the cost and all means which are necessary to that end are lawful. The situation of troops in a riotous and insurrectionary district approximates that of troops in an enemy's country, and in proportion to the extent and violence of the overt acts of hostility shown is the degree of severity justified in the means of repression. The requirements of the situation in either case, therefore, shift with the circumstances, and the same standard of justification must apply to both. The only difference is the one already adverted to, the liability to subsequent investigation in the courts of the land after the restoration of order.

Coming now to the position of the re'ator in regard to responsibility, we find the law well settled. "A subordinate stands, as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point a soldier or member of the *posse comitatus* may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and, if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier consequently runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances." Hare, Const. Law, p. 920.

The cases in this country have usually arisen in the army and been determined in the United States courts. But by the articles of war (article 59), under the acts of congress, officers or soldiers charged with offenses punishable by the laws of the land are required (except in time of war) to be delivered over to the civil (*i. e.*, in distinction from military) authorities, and the courts proceed upon the principles of the common (and statute) law. United States v. Clark, 31 Fed. Rep. 711. The decisions, therefore, are precedents applicable here.

A leading case is United States v. Clark, 31 Fed. Rep. 710. A soldier on the military reservation at Ft. Wayne had been convicted by court martial, and when brought out of the guard house with other prisoners at "retreat" broke from the ranks, and was in the act of escaping, when Clark, who was the sergeant of the guard, fired and killed him. Clark was charged with homicide, and brought before the United States district judge, sitting as a committing magistrate. Judge Brown, now of the Supreme Court of the United States, delivered an elaborate and well-considered opinion, which has ever since been quoted as authoritative. In it he said: "The case reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the deceased." Then, after referring to the common-law principle that an officer having custody of a prisoner charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape, and pointing out the peculiarities of the military code, which practically abolish the distinction between felonies and misdemeanors, he continued: "I have no doubt the

same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice."

In McCall v. McDowell, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673, where an action was brought by plaintiff against Gen. McDowell and Capt. Douglas for false imprisonment under a general order of the former for the arrest of persons publicly exulting over the assassination of President Lincoln, the court said: "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander; otherwise he is placed in a dangerous dilemma of being liable to damages to third persons for obedience to the order, or for the loss of his commission and disgrace for disobedience thereto. * * * Between an order plainly legal and one palpably otherwise there is a wide middle ground, where the ultimate legality and propriety of orders depend or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command." The court, sitting without a jury, accordingly gave judgment for Capt. Douglas, though finding damages against Gen. McDowell.

In United States v. Carr, 1 Woods, 480, Fed. Cas. No. 14,732, which was a case of the shooting of a soldier in Fort Pulaski by the prisoner, who was sergeant of the guard, Woods, J., afterwards of the Supreme Court of the United States, charged the jury: "Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, then the killing was not unlawful. But if, on the other hand, the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

In Riggs v. State, 3 Cold. 85, 91 Am. Dec. 272, the Supreme Court of Tennessee held to be correct an instruction to the jury that "any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him."

These are the principal American cases, and they are in entire accord with the long line of established authorities in England.

Applying these principles to the act of the relator, it is clear that he was not guilty of any crime. The situation, as already shown, was one of martial law, in which the commanding general was authorized to use as forcible military means for the repression of violence as his judgment dictated to be necessary. The house had been dynamited at night and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground, therefore, for doubt as to the legality of the order to shoot. The relator was a private soldier, and his first duty was obedience. His orders were clear and specific, and the evidence does not show that he went beyond them in his action. There was no malice, for it appears affirmatively that he did not know the deceased, and acted only on his orders when the situation appeared to call for action under them. The unfortunate man who was killed was not shown to have been one of the mob gathered in the vicinity, though why he should have turned into the gate is not known. The occurrence, deplorable as it was, was an illustration of the dangers of the lawless condition of the community, or of the minority who were allowed to control it, and must be classed with the numerous instances in riots and mobs where mere spectators and even distant noncombatants get hurt without apparent fault of their own.

Whenever a homicide occurs, it is not only proper, but obligatory, that an official inquiry should be made by the legal authorities. Such an inquiry was had here at the coroner's inquest, and if there were any doubt about the facts we should remand the relator to the custody of the constable under his warrant, for a further hearing before the justice of the peace. But there was no conflict in the evidence before the coroner, and the commonwealth's officer makes no claim here that anything further can be shown. The facts, therefore, are not in dispute, and the question of relator's liability depends on whether he had reasonable cause to believe in the necessity of action under his orders. As said by Judge Hare, citing Lord Mansfield, in Mostyn v. Fabrigas, 1 Cowper, 161: "The question of probable cause in this as in most other instances is one of law for the

court. The facts are for the jury; but it is for the judges to say whether, if found, they amount to probable cause." Hare's Const. Law, 919.

In United States v. Clark, 31 Fed. Rep. 710, already cited, Mr. Justice Brown said: "It may be said that it is a question for the jury in each case whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that question to them. * * * But as I would, acting in (that) capacity, set aside a conviction if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge."

The court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals (Gosline v. Place, 32 Pa. 520), has the authority and the duty, on *habeas corpus* in favor of a prisoner held on a criminal charge, to see that at least a *prima facie* case of guilt is supported by the evidence against him. In the relator's case the facts presented by the evidence are undisputed, and on them the law is clear and settled. If the case was before a jury, we should be bound to direct a verdict of not guilty, and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him to trial, and he is accordingly discharged.

The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent.

NOTE—*Liability of Soldier, Militiaman, or Member of Posse Comitatus for Crimes or Trespasses Committed in Obedience to Orders in Times of Peace.*—It would be an anomaly in jurisprudence to say that martial law, in its generic sense, can exist at the same time with the enforcement of the civil law. Two general and opposing systems of law cannot exist in the same place at the same time. Martial law is a system of law and procedure suited to the exigencies of a state of war and excludes any idea of interference by civil courts or civil officers. It is government by the military, and while in some countries it may exist in times of peace at the mere declaration of the sovereign, it is settled by the overwhelming weight of authority in England and the United States that it cannot exist in these countries except in times of active war, or insurrection. *Ex parte* Milligan, 71 U. S. 2. Of course, under martial law the soldier is never responsible to the civil law or any of its officers, no matter how outrageous may be his offense against those laws; his responsibility is solely to the court martial.

What the writer of the opinion describes as "qualified martial law" is a rather confusing term, resulting, on final analysis, to nothing more than the exercise of the police power in its fullest extent, on behalf of the executive officers of the civil government. It does not matter to what extreme the civil executive government may go in the exercise of its police power, it is always amenable to the civil courts, just as under martial law the executive officers of the military are responsible to the court martial for any infraction of that code of laws. It would therefore appear that there is no place for the term "qualified martial law," and that all government everywhere is in the hands either of the civil authorities amenable to civil courts, or of military authorities amenable to the courts martial. There can be no attempted mixture of the two systems.

Our discussion here involves, however, the liability of the soldier, militiaman, or member of the *posse comitatus* for crimes or trespasses committed in obedience to orders in times of peace. It follows, without argument, that every act of the executive government acting through any one of the foregoing agencies is within the cognizance and jurisdiction of the civil courts. But in times of extreme peril, the executive government, although responsible to the courts, is not hampered by the hard bound rules of the criminal code, but has a wide measure of police power, generously construed by the courts, for maintaining its own authority and enforcing the provisions of the law or the decrees of the courts. Whether, however, the sheriff, who as chief executive of the county who orders out the *posse comitatus*, or the governor who orders out the state militia, or the president who orders out the federal troops to quell a riot or to enforce the law, is justified or not, by the circumstances in giving a specific order, is not the soldier, militiaman, or member of the *posse comitatus*, whose first duty it is to obey, justified by his obedience to an order which is not palpably erroneous?

"His not to reason why
His but to do or die."

The best statement of the rule on the question here discussed is that announced by Hare in his Lectures on American Constitutional Law: "A subordinate stands as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point a soldier or member of the *posse comitatus* may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and, if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong, with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier, consequently, runs little risk in obeying any order which a man of common sense would regard as warranted by the circumstance." Hare, Const Law, p. 920.

For cases holding and supporting the rule thus announced, see Mitchell v. Harmony, 13 How. (U. S.) 115; United States v. Clark, 31 Fed. Rep. 710; McCall v. McDowell, 1 Abb. 211, Fed. Cas. No. 8,673; United States v. Carr, 1 Woods, 480; Riggs v. State, 3 Cold. 85, 91 Am. Dec. 272.

JETSAM AND FLOTSAM.

IMMUNITY OF MARRIED WOMEN FROM CRIMINAL LIABILITY AT COMMON LAW AND UNDER ENGLISH STATUTES.

The position of married women as regards their liability in respect of crimes committed by them presents some points that it may be of interest to review, and we propose to examine some of the anomalies which this subject affords with a view to trying to distinguish which of those anomalies are real and which are only apparent, and to determine how they have come to form part of the criminal law of the land.

The first subject that arises out of this topic is afforded by the tangled mass of rules that regulate the cases in which a wife can claim immunity from criminal liability in respect of crimes committed by her in the presence of her husband. Thus, if a married woman commits larceny, burglary or forgery while her husband is present, there is a legal presumption that she has committed these crimes under marital compulsion, and she is, in consequence, exonerated from the punishment to which she would otherwise have been liable. That some such rule should have come into existence appears easy to understand, assuming the reality of the obedience of married women to their husbands which is supposed to have existed in early days, but a difficulty arises when we go on to consider that it is only with regard to some offenses that the rule has any application. Why is it, for example, that in cases of treason, murder, the majority of misdemeanors, and all offenses punishable in a summary manner, the same presumption is not raised? Upon what basis is this division of offenses made, and for what reasons are they treated differently?

It is generally stated that the rule applies only to felonies and not to misdemeanors, and only to such felonies as are not *mala in se*, and prohibited by the law of nature, or particularly heinous in their character. (See 1 Hale, 45, 48; 4 Bl. Comm. 29.) This cannot, however, be accepted as at all an accurate division. In the first place the rule does apply to some misdemeanors, *e. g.*, in Reg. v. Price, 8 C. & P. 18, a woman was indicted for the misdemeanor of uttering false coin, and the common sergeant, having consulted with Bosanquet, J., and Coltman, J., held that she was entitled to the benefit of the presumption that she had acted under compulsion on the part of her husband, who was present at the time that she uttered the coin.

On the other hand, the division of felonies into those which are and those which are not *mala in se* appears inapplicable. It is true that treason and homicide are outside the cases in which protection is afforded to married women by the presumption of coercion; but on the other hand, burglary, which is also clearly *malum in se*, is not.

In order to arrive at any satisfactory opinion on the matter, it appears to be necessary to approach the subject from an historical standpoint, keeping clearly in one's mind the fact that the wife's immunity depends entirely upon a presumption—the presumption, that is, that she acted under compulsion and not as a free agent, and that her consequent freedom from liability to punishment is analogous to the freedom from liability enjoyed by infants and persons *non compos mentis* and is in reality a branch of the comprehensive doctrine of *mens rea*.

That coercion is the real reason of the wife's immunity is abundantly clear (1 Hale, 516; R. v. Cohen, 11 Cox, 99; Reg. v. Torpey, 12 Cox 45), and no advantage is to be gained by searching for any other origin, such as "the tenderness the law hath for a wife" (Reg. v. Hughes, 2 Lewin C. C. 29), or by attempting to trace it back to a time when the husband may have been liable for criminal wrongs committed by his wife, as well as for her civil wrongs against private persons, a state of affairs which would render the personal punishment of the wife by the state unnecessary.

The division of offenses, where coercion by a husband who is present is presumed, from offenses where such coercion is not presumed, probably arose n this way.

The distinction between felonies and misdemeanors appears to have been of greater importance in early days than at the present time, owing partly, perhaps, to the more severe punishments meted out to the former, and the law as to felonies seems to have crystallized, so to speak, at an earlier date than that as to misdemeanors. It is probable that the rule about coercion being presumed where a crime was committed in the husband's presence became an established rule in the case of felonies before the law as to misdemeanors assumed a definite form. When misdemeanors by married women came to be dealt with, and the rules of the court regarding them became more exact, the rule as to the immunity of married women was not applied except in the case of those misdemeanors that were closely analogous to felonies where the rule was in force, such, for example, as attempting to commit a felony or uttering base coin. This may have been chiefly due to the reason for the rule, namely, the presumption of coercion, being to a certain extent lost sight of, and to the rule, in consequence, being held to apply only in cases of those particular crimes to which it had been applied in cases already decided. The gradual alteration in the condition of married women would also probably have its effect in preventing the rule being extended, especially with regard to offenses of more modern creation.

The liability of married women for certain felonies, such as treason and murder, notwithstanding the presence of their husbands when the offenses were committed, appears not to be due to coercion by the husband not being presumed, but to such coercion not being held sufficient to excuse the commission of such crimes.

To entitle the wife to an acquittal it was necessary that the coercion exercised should be of such a nature that she could not avoid committing the crime, that is to say, it was necessary for the husband to be actually present; if he were absent no orders or threats made by him would be regarded as sufficient coercion to form a defense for the wife. Reg. v. Morris, R. & R. 270.

In cases where the presumption arises it is coercion of this invincible nature that is presumed. A presumption is not, however, the same as conclusive proof, and is liable to be rebutted by evidence that the wife acted as a free agent. The amount of evidence necessary for this purpose will vary to a certain extent with the nature of the charge, *e. g.*, on a charge of keeping a disorderly house, evidence that the woman managed the house and lived in it with her husband has been considered sufficient in itself to rebut the presumption (Reg. v. Williams, 10 Mod. 63), the management of the house being a matter in which she would not be subject to coercion. 1 Hawk. ch. 1 sec. 12.

The gradual diminution in the effect of the rule that can be noticed appears to be due more to the greater readiness of juries to accept slighter evidence as sufficient to rebut the presumption than to any whittling away of the rule by the bench.

Another instance of the immunity of married women from criminal liability is afforded by the manner in which the courts have treated offenses committed by them against their husbands. Their position with regard to larceny will serve as an illustration of this.

At common law a wife could not commit larceny in respect of goods of her husband, or of goods which were the joint property of her husband and a third

person (Reg. v. Willis, 1 Mood. 375), because, as the husband and wife are one person in law, there could on that account be no taking by the wife to constitute larceny.

In accordance with this doctrine it was held that a third person who took the husband's goods was not guilty of larceny if he did so with the privity and consent of the wife (Reg. v. Avery, 28 L. J. M. C. 185), unless the goods were taken with a view to an elopement or where the wife was living in adultery with the third person. Reg. v. Mutters, L. & C. 511, 34 L. J. M. C. 54.

The Married Women's Property Act, 1882, has destroyed the wife's immunity in this respect when she is separated from her husband, and with regard to acts done when she is about to leave him, so that she may now be guilty of larceny as to her husband's property. The state of the law previous to that statute, however, still has an effect upon the law as it exists to-day.

As the wife could not before that statute steal her husband's goods, it followed that a third person could not either at common law or under the Larceny Act, 1861, be guilty of receiving goods, taken by the wife from her husband, knowing them to be stolen, because such goods were not in law stolen at all. Reg. v. Kenny, 2 Q. B. D. 307, 46 L. J. M. C. 156.

After the passing of the Married Women's Property Act, 1882, the question arose as to whether section 91 of the Larceny Act, 1861, which makes the receiving of goods stolen, etc., a felony punishable under that act, applied or not where the goods were stolen by a wife from her husband.

In Reg. v. Streeter (1900), 2 Q. B. 601, 64 J. P. 537, it was held that it did not apply. In that case a married woman sent a sewing machine and other household goods, the property of her husband, to S, and then left her home and went to live with S. The jury found that S received the goods knowing them to be stolen. It was held that S could not be properly convicted under the Larceny Act, 1861, sec. 91, because that section only applied where the stealing, etc., of the goods amounted "to a felony either at common law or by virtue of this act," and the stealing by the wife was only an offense under the Larceny Act by virtue of the Married Women's Property Act, 1882, and was not an offense "by virtue of" the Larceny Act. The distinction, though a fine one, appears to be sound.

The courts have always shown themselves adverse to the extending of penal enactments by construction. A good illustration of this is afforded by the manner in which 31 Eliz. ch. 12, sec. 5, was construed. That statute took away the benefit of clergy from an accessory in horse stealing. It was held that that enactment extended only to such persons as were, in the judgment of the law, accessories at the time the act was passed, namely accessories at common law, and did not apply to those who were accessories only in consequence of subsequent legislation, and they were therefore not ousted from the benefit of clergy by that act. See Foster's Crown Law, p. 372.

This disinclination of the courts to extend penal enactments is exhibited in numerous cases, but it cannot be regarded as a hard-and-fast rule, and is, of course, subject to the intention of the legislature gathered from the statute, even when that intention is merely implied.

Thus where an earlier statute deals with a genus and by a subsequent statute a new species is brought within that genus, the former statute deals with that new species. See Judgment of Bovill, L. C. J., in Reg. v. Smith, 39 L. J. M. C. 112. For example, choses in action were not originally within 13 Eliz. ch. 5, against fraudulent conveyances, that statute being applicable only to property which could be taken in execution (Sims v. Thomas, 12 A. & E. 336), but choses in action were made subject to execution by 1 and 2 Vict. ch. 110, and having thereby come within the genus of property that could be taken in execution, became subject to the operation of 13 Eliz. ch. 5, without any express enactment to that effect. Barrach v. McCulloch, 26 L. J. Ch. 105.

A strict limitation of the words "or in virtue of the act" in the Larceny Act, 1861, sec. 91, appears to be rendered necessary by the wording of the earlier sections of that act which deal with accessories before and after the fact. Sections 1 and 3. In both of those sections, the act speaks of felonies that are felonies "at common law or by virtue of any act passed or to be passed." In view of this difference of wording in the sections it seems impossible to disagree with the decision in Reg. v. Streeter, *supra*.

The mere receipt of stolen goods knowing them to be stolen did not at common law make the receiver an accessory to the crime, but as such receipt is a distinct misdemeanor at common law punishable by fine and imprisonment (1 Hale, 620) it is apprehended that an indictment at common law will lie against the receiver of property stolen by a wife from her husband.—*Justice of the Peace* (*London*).

CORRESPONDENCE.

LETTERS OF ROBERT G. INGERSOLL TO HON. J. R. DOOLITTLE.

To the Editor of the Central Law Journal:

The letters which follow, in the clear, bold handwriting of the late Robert G. Ingersoll, while unimportant, so far as the subjects to which they relate are concerned, unless explained, yet so thoroughly and graciously represent the true amenities of the legal profession, and emanating, as they do, from one so greatly distinguished in the practice of the law and in the world of public affairs, to another member of the same profession and scarcely less distinguished as a publicist and orator, that they are offered in their entirety to your readers. The first two letters evidently refer to matters in which Judge Doolittle and Mr. Ingersoll are opposed to each other. The other refers to litigation in which they are alike interested in the result. It is a pleasure and an inspiration to note the manifestations of such absolute good feeling in the practice of the law among members so eminent as were these two intellectual giants. And yet, of course, these are not isolated instances of the presence of such a tolerant and fraternal feeling among lawyers of the better class.

The letters were found among the private papers of the late ex-Senator Doolittle in the writer's possession. The genuineness of the writing is not a matter of doubt.

Yours truly,

DUANE MOWRY.

Milwaukee, Wisconsin.

"PEORIA, ILL., Dec. 16, 1871.

Hon. J. R. Doolittle:

My Dear Sir: Just received your letter. You forget to enc ose a copy of the stipulation. Please send me one. I have ordered copies of the declarations and will send them right away. So far as we are concerned we are willing (of course) to restore the records. So far as regards reading copies of depositions mentioned in the new stipulation, we are willing to do that. It may be we will alter the stipula-

tion as to time; but, substantially, we think it well enough as it is.

Nothing gives us more pleasure than to act fairly with such men as you. Yours truly,

INGERSOLL & MCCUNE."

"PEORIA, May 9, '72.

Hon. J. R. Doolittle.

Dear Sir: If I am not on hand at the time and place mentioned in your letter, go ahead without me, and let the court decide. I will never ask you to wait another moment. You have borne with me like a second Job. Yours truly,

R. G. INGERSOLL."

"NEW YORK, July 26, 1886.

Dear Doolittle:

Just received your dispatch. What has got into Boldgett? Can you not appeal to the circuit court? If not, we will appeal to the supreme court.

I intend to settle that case in the court of last resort.

Give me your ideas in full.

Yours truly,

R. G. INGERSOLL."

BOOK REVIEWS.

CLEMENT ON FIRE INSURANCE.

Not for many years has there appeared a legal work on the subject of fire insurance so logically analyzed and so exhaustively and practically treated as the recent volume written by George A. Clement of the New York Bar, entitled Fire Insurance as a Valid Contract in Event of Fire and as Affected by Construction and Waiver, Estoppel, and Adjustment of Claims Thereunder. The treatment of this subject by Mr. Clement includes an analysis and comparison of the various standard forms, all reduced to rules, with the relevant statutory provisions of all the states. A rather new and very attractive feature is the practical analysis of the rules as they exist today freed from all academic discussion. It is not a treatise but is of more practical value than either, as it reduces the various subjects to a system of rules, mainly as affecting conduct, each preceded with a clear, concise, summary statement of its specific subject matter. It includes in each instance the rule as imposed by contract, the difference in language of the various standard forms being pointed out. The book is a radical departure from stereotyped methods both in treatment and in arrangement and printing. We unhesitatingly give Clement on Fire Insurance the first place of authority in that branch of the law of which it is so able an exponent.

Printed in one volume of 637 pages and published by Baker, Voorhis & Co., New York.

BOOKS RECEIVED.

The Law of Contracts. By Theophilus Parsons, LL.D., Author of Treatises on the Elements of Mercantile Law, on the Law of Shipping and Admiralty, on Marine Insurance, on Partnership, on Notes and Bills, and on the Law of Business and Business Men. Vols. 1, 2 and 3. Ninth Edition, edited by John M. Gould. Boston: Little, Brown, & Company, 1904. Sheep, pp. 2,700. Price, $18.00. Review will follow.

Citizenship of the United States. By Frederick Van Dyne, LL.M., Assistant Solicitor of the Department of State of the United States. The Lawyers' Co-operative Publishing Co., Rochester, New York, 1904. Sheep, pp. 412. Price, $4.50. Review will follow.

A Treatise on the New York Employers' Liability Act. By George W. Alger, of the New York Bar, and Samuel S. Slater, of the New York Bar. Albany, N. Y. Matthew Bender, 1903. Law Buckram, pp. 200. Price, $2.00. Review will follow.

Bender's National Lawyers' Diary, 1904. Published Annually. Albany, N. Y. Matthew Bender, 1903. Price, $1.50.

HUMOR OF THE LAW.

"Ephem, s'pose de good Lawd should come down an' look inter yer eye an say, 'Ephem, what hab yo' done wid all those chickens dat yer hab stole?' What would yer say?"

"Parson, I might say dat my old 'ooman cooked em, but you knows dat a man ain't bound to testify agin his wife."

"Young man," asked the employer, "how can you afford to dress so elaborately and expensively on the salary we pay you?"

"I can't," gloomily answered the young man; "I ought to have more salary."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

CALIFORNIA 26, 41, 75, 88, 89, 122
DIST. OF COL. APP. 124, 150, 153
GEORGIA, 6, 32, 34, 44, 47, 54, 55, 56, 57, 62, 65, 67, 69, 73, 74, 78, 79, 80, 88, 90, 105, 107, 108, 110, 111, 118, 119, 120, 121, 137, 139, 145, 147, 165
ILLINOIS 143
INDIAN TERRITORY 3, 81
IOWA 13, 126
MASSACHUSETTS 8, 64, 77, 95
MICHIGAN 97, 100, 140, 166
NEBRASKA, 4, 66, 68, 85, 86, 93, 94, 98, 113, 117, 125, 129, 131, 141, 159, 161
NEW JERSEY 160
NEW YORK 96, 109, 152
NORTH CAROLINA 33, 37, 59, 127, 134, 142
NORTH DAKOTA 51, 99, 146
PENNSYLVANIA 128, 144, 149, 163, 164
RHODE ISLAND 156, 157
UNITED STATES C. C., 10, 11, 31, 35, 38, 39, 46, 48, 49, 50, 58, 61, 70, 71, 76, 82, 92, 101, 102, 106, 112, 114, 115, 123, 130, 132, 133
U. S. C. C. OF APP., 5, 7, 9, 18, 25, 43, 63, 72, 84, 87, 91, 103, 104, 116, 138, 167
UNITED STATES D. C., 1, 2, 12, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30
UTAH 52, 53, 148, 151, 162
VIRGINIA 36, 40
WASHINGTON 135, 136, 158
WEST VIRGINIA 60
WISCONSIN 42, 45, 154, 155

1. ACCIDENT INSURANCE—Estoppel.—A fidelity insurance company held estopped to allege failure of the employee to sign the bond as a defense, where it accepted premiums for two renewals with knowledge that the bond had not been so signed.—Proctor Coal Co. v. United States Fidelity & Guaranty Co., U. S. C. C., N. D. Ga., 124 Fed. Rep. 424.

2. ADMIRALTY—Earnings of Vessel.—Earnings of a vessel while in the custody of a marshal, after her seizure on process and before her sale, from her use under an agreement with the marshal, are to be paid into court to apply on the claim of the libelant.—The C. W. Cowles, U. S. D. C., N. D. Iowa, 124 Fed. Rep. 458.

3. ANIMALS—Trespass.—In a grazing country, the owner of cattle is not liable for trespass committed by

them, unless they have broken through a sufficient fence.—Perry v. Cobb, Ind. Ter., 76 S. W. Rep. 289.

4. APPEAL AND ERROR—Inadequate Relief.—Where the ground of complaint is that the findings justify more relief than was granted, a record containing the findings and judgment only is insufficient to procure modification or reversal.—Shelby v. Creighton, Neb., 96 N. W. Rep. 882.

5. APPEAL AND ERROR—Party not Aggrieved.—One who secures by a judgment all the relief he seeks cannot maintain error or appeal.—Guarantee Co. of North America v. Phenix Ins. Co., U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 170.

6. APPEAL AND ERROR—Quo Warranto.—A judgment overruling the demurrer to an application for a writ of *quo warranto* is not final.—Sayer v. Harding, Ga., 45 S. E. Rep. 418.

7. APPEAL AND ERROR—Review of Evidence.—Where a trial judge, sitting as a jury, failed to find the facts specially, and rendered a general finding in favor of plaintiff, defendant could not review the facts on appeal.—Berwind-White Coal Min. Co. v. Martin, U. S. C. C. of App., Third Circuit, 124 Fed. Rep. 313.

8. ARREST—Poor Debtors.—The return on the execution held conclusive, in an action on a poor debtor's recognizance, that the recognizance was not taken after an escape of the debtor.—Bent v. Stone, Mass., 68 N. E. Rep. 46.

9. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Preferences.—Under the law of South Carolina a mortgage to one creditor covering all the debtor's property amounts to a general assignment, and is void because preferential.—Pollock v. Jones, U. S. C. C. of App., Fourth Circuit, 124 Fed. Rep. 163.

10. ATTORNEY AND CLIENT—Contracts Between.—The purchase by an attorney of his client's interest in a claim in suit is not necessarily invalid, and will be sustained where the parties dealt on equal terms and no advantage was taken of the relationship.—Meyers v. Luzerne County, U. S. C. C., M. D. Pa., 124 Fed. Rep. 436.

11. BAIL—Forfeiture.—A court in which an indictment was pending against a nonresident defendant held entitled to forfeit a recognizance given for his appearance in another state, as against a nonresident surety, on the defendant's failure to appear.—Kirk v. United States, U. S. C. C., N. D. N. Y., 124 Fed. Rep. 324.

12. BANKRUPTCY—Adjudication.—Where between the filing of an involuntary petition and the adjudication the business of the alleged bankrupt is continued by a receiver by order of the court, and he continues to occupy premises leased by the bankrupt, the lessor is entitled to prove his claim for rent until the date of adjudication.—*In re* Hinckel Brewing Co., U. S. D. C., N. D. N. Y., 123 Fed. Rep. 942.

13. BANKRUPTCY—Alimony.—A claim of a wife for alimony is not a property right, and property awarded her as alimony after her bankruptcy does not become a part of her estate in bankruptcy.—*In re* LeClaire, U. S. D. C., N. D. Iowa, 124 Fed. Rep. 654.

14. BANKRUPTCY—Application for Injunction.—An application to a bankruptcy court to restrain a county judge from punishing a bankrupt for contempt in failing to attend and be examined in supplementary proceedings held properly treated as an application for a stay of such proceedings.—*In re* William E. De Lany & Co., U. S. D. C., N. D. N. Y., 124 Fed. Rep. 280.

15. BANKRUPTCY—Collusion.—Petitioning creditors in involuntary bankruptcy proceedings against a corporation held not estopped to urge an act of bankruptcy on the part of the corporation as against an attaching creditor opposing the adjudication.—*In re* C. Moench & Sons Co., U. S. D. C., W. D. N. Y., 123 Fed. Rep. 965.

16. BANKRUPTCY—Compensation of Receivers.—Bankr. Act July 1, 1898, ch. 541, §§ 40, 48*a*, prior to amendment, relating to compensation of receivers and trustees, held not to authorize payment of commissions on sums paid to satisfy fixed liens on real estate from the proceeds of a sale thereoby the trustee.—*In re* Hinckel Brewing Co., U. S. D. C., N. D. N. Y., 124 Fed. Rep. 702.

17. BANKRUPTCY—Creditors.—The list of creditors filed with the answer of an alleged bankrupt, as required by Bankr. Act July 1, 1898, ch. 541, § 59*d*, when he sets up as a defense to the petition of a single creditor that the number of his creditors exceeds 12, should show full particulars in regard to the debt of each, to avoid the necessity of a reference.—W. A. Gage & Co. v. Bell, U. S. D. C., W. D. Tenn., 124 Fed. Rep. 871.

18. BANKRUPTCY—District Court.—The district court in bankruptcy has no jurisdiction over a controversy between trustees in bankruptcy and an adverse claimant as to title of property in the possession of the latter.—*In re* Rochford, U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 182.

19. BANKRUPTCY—Exemptions.—The issue as to the right of a bankrupt to the exemption claimed by him is made by exceptions to the trustee's report setting aside the property, and the burden rests on the bankrupt to prove all facts essential to his right.—*In re* Campbell, U. S. D. C., W. D. Va., 124 Fed. Rep. 417.

20. BANKRUPTCY—Exempt Property.—Bankr. Act July 1, 1898, §57*h*, prescribing the method of payment of dvidends on secured claims, held not limited by section 6, so as to entitle a creditor secured by mortgage on exempt property to dividends on his entire claim, and to resort to the security only for a balance unpaid.—*In re* Lantzenheimer, U. S. D. C., N. D. Iowa, 124 Fed. Rep. 716.

21. BANKRUPTCY—Findings to Justify.—To justify an order directing a bankrupt to turn over money or property to his trustee, it must be found that he has such money or property belonging to his estate in his possession or under his control, which he has concealed and withheld from his trustee.—*In re* Felson, U. S. D. C., N. D. N. Y., 124 Fed. Rep. 288.

22. BANKRUPTCY—Liens on Exempt Property.—Under Bankr. Act 1898, ch. 541, § 2, subd. 11, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), the court of bankruptcy held to have jurisdiction to determine a creditor's alleged equitable lien on money of the bankrupt in the hands of a trustee claimed by the bankrupt as exempt.—*In re* Lucius, U. S. D. C., S. D. Ala., 124 Fed. Rep. 455.

23. BANKRUPTCY—Pleadings.—The simple forms of the bankruptcy practice found in the general orders and prescribed forms should be followed, to the exclusion of the more costly prolix and less suitable forms of equity pleading and procedure.—W. A. Gage & Co. v. Bell, U. S. D. C., W. D. Tenn., 124 Fed. Rep. 871.

24. BANKRUPTCY—Preferences.—By Act Feb. 5, 1903, a creditor receiving a preference more than four months before bankruptcy held bound to surrender the same, in order to be entitled to share in the bankrupt's estate.—*In re* Busby, U. S. D. C., M. D. Pa., 124 Fed. Rep. 469.

25. BANKRUPTCY—Preferences.—A mere promise by a debtor when the debt is contracted to give security does not amount to a mortgage, and the giving of one subsequently on a renewal, when the debtor is insolvent and within four months prior to his bankruptcy, creates a preference.—Pollock v. Jones, U. S. C. C. of App., Fourth Circuit, 124 Fed. Rep. 163.

26. BANKRUPTCY—Provable Claims.—Under Bankr. Act July 1, 1898, ch. 541, § 57, subd. "*n*," claims are not provable subsequent to one year after the adjudication, and the fact that a claim was unscheduled and the creditor without notice of the proceedings makes no difference.—Santa Rosa Bank v. White, Cal., 73 Pac. Rep. 577.

27. BANKRUPTCY—Replevined Goods.—Goods of a bankrupt taken on a replevin suit brought by a creditor within four months of the bankruptcy proceedings must be returned to the trustee.—*In re* Haynes, U. S. D. C., D. Ver., 123 Fed. Rep. 1001.

28. BANKRUPTCY—State Court.—A court of bankruptcy cannot dispossess the receiver or other officers of a state court by summary process, or otherwise than by formal

proceedings taken by its receiver or trustee.—Ross-Meecham Foundry Co. v. Southern Car & Foundry Co., U. S. D. C., W. D. Tenn., 124 Fed. Rep. 403.

29. BANKRUPTCY—Taxes.—Act May 9, 1903, exempting taxes sued for by a city from the statute of limitations held not to apply to a proceeding before a referee in bankruptcy to obtain a priority of payment of taxes decided by the referee before the act was passed.—*In re* Stalker, U. S. D. C., W. D. N. Y., 123 Fed. Rep. 961.

30. BANKRUPTCY—Vote of Creditors.—Refusal of a referee in bankruptcy to adjourn a meeting for the selection of a trustee for 24 hours, after an ineffectual vote of the creditors and the appointment of a trustee of the referee's selection, held error.—*In re* Nice & Schreiber, U. S. D. C., E. D. Pa., 123 Fed. Rep. 987.

31. BANKS AND BANKING—Suit Against Directors.—Creditors of an insolvent national bank cannot maintain a suit against its directors, under Rev. St. § 5239, to recover for general distribution as assets of the bank sums alleged to have been lost to it through the negligence and mismanagement of defendants.—Boyd v. Schneider, U. S. C. C., N. D. Ill., 124 Fed. Rep. 239.

32. BILLS AND NOTES—Attorney's Fees.—Where suit is brought on a note providing for attorney's fees, and one defense is sustained, plaintiff is not entitled to any fees.—Trentham v. Bluthenthal & Bickart, Ga., 45 S. E. Rep. 421.

33. BURGLARY—Indictment.—A conviction under an indictment for breaking and entering a dwelling with intent to commit rape with sustain a plea of former jeopardy on an indictment for burglary based on the same facts.—State v. Staton, N. Car., 45 S. E. Rep. 362.

34. CARRIERS—Instruction.—In an action by a passenger for injuries, an instruction that there could be no recovery if the plaintiff voluntarily jumped from the trian over protest of the conductor, held properly refused.—Central of Georgia Ry. Co. v. McKinney, Ga., 45 S. E. Rep. 430.

35. CARRIERS—Reasonableness of Rates.—A line of railroad, although operated in connection with other lines owned by the same company but under separate charters, may properly be considered as an independent line for the purpose of determining the reasonableness of rates fixed by the state thereon.—Louisville & N. R. Co. v. Brown, U. S. C. C., N. D. Fla., 123 Fed. Rep. 946.

36. CARRIERS—Remote and Proximate Cause.—Carrier, by delaying stock, held not liable for subsequent injury from storm after the stock had left.—Herring v. Chesapeake & W. R. Co., Va., 45 S. E. Rep. 322.

37. CARRIERS—Right to Damages.—A person, having a ticket and being sober, who is excluded from a train held entitled to actual and exemplary damages.—Story v. Norfolk & S. R. Co., N. Car., 45 S. E. Rep. 349.

38. COMPROMISE AND SETTLEMENT—Gifts.—A compromise agreement between the executor and beneficiaries under the will of a testatrix and her heirs at law held not to vest the latter with the right to maintain a suit to recover property which had been delivered by the decedent to another as a gift.—Bishop v. Leonard, U. S. C. C., D. Ind., 123 Fed. Rep. 981.

39. CONSPIRACY—Labor Union.—There can be no such thing as an unlawful conspiracy to destroy a labor union by discharging its members or refusing to employ them.—Boyer v. Western Union Tel. Co., U. S. C. C., E. D. Mo., 124 Fed. Rep. 246.

40. CONSTITUTIONAL LAW—Trading Stamps—Act Feb. 19, 1898 (Acts Gen. Assem. 1897-98, p. 442), prohibiting the use of trading stamps, held in violation of the constitution of the United States and of the state as an infringement on personal liberty.—Young v. Commonwealth, Va., 45 S. E. Rep. 327.

41. CONSTITUTIONAL LAW—Water Rates.—An ordinance of San Francisco reducing the rates to be charged by a water company held unconstitutional and invalid, as fixing a rate so low as to deprive the company of its property witaout just compensation and without due process of law—Spring Valley Waterworks v. City and County of San Francisco, U. S. C. C., N. D. Cal., 124 Fed. Rep. 574.

42. CONTRACTS—Advertising.—Defendants held entitled to stop further performance of a contract for advertising while the same was executory, and limit their further liability to damages sustained for breach of the contract.—Ward v. American Health Food Co., Wis., 96 N. W. Rep. 388.

43. CONTRACT—Modification.—An offer of modification in an answer to a proposal for a contract, and an acceptance of such counter offer, make the modification a part of the agreement.—Sloan v. Wolf Co., U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 196.

44. CONTRACTS—Sale of Cotton.—Where, in a sale of cotton, the contract is silent as to the weight of bales, evidence of the trade meaning of such term is inadmissible.—J. T. Stewart & Son v. Cook, Ga., 45 S. E. Rep. 398.

45. CONTRACTS—Time for Completion of Work.—Where a contract for the construction of a certain foundation fixed no time for the completion of the work, the work must be completed within a reasonable time.—Lang v. Menasha Paper Co., Wis., 96 N. W. Rep. 393.

46. CORPORATIONS—Capital Stock.—While the capital stock and property of a corporation are regarded as a trust fund for the payment of its debts, they are not a trust fund for the payment of stockholders on dissolution.—Knott v. Evening Post Co., U. S. C. C., W. D. Ky. 124 Fed. Rep. 342.

47. CORPORATIONS—Purchase of Claims.—Officers of a corporation, having peculiar opportunity to know of its condition, cannot use their position to escape liability by the purchase of claims to be used as a set-off.—Nix v. Ellis, Ga., 45 S. E. Rep. 404.

48. CORPORATIONS—Suit by Stockholder.—It is not a condition precedent to the maintenance of a suit by a stockholder to set aside an alleged fraudulent agreement made by the corporation that complainant should offer to return the consideration received by the corporation.—Edwards v. Mercantile Trust Co., U. S. C. C., S. D. N. Y., 124 Fed. Rep. 381.

49. CORPORATIONS—Validity of Service.—Whether a foreign corporation was maintaining an office and doing business within a state, when it was there served with summons, where it depends on questions of fact, is for the jury.—Audenried v. East Coast Milling Co., U. S. C. C., E. D. Pa., 124 Fed. Rep. 697.

50. COVENANTS—Deed.—There is no implied warranty in a deed to real estate which renders the grantor a necessary party to a suit against the grantee affecting the title to a part of the property conveyed.—Thompson v. Schenectady Ry. Co., U. S. C. C., N. D. N. Y., 124 Fed. Rep. 274.

51. COVENANTS—When Broken.—A covenant against incumbrances is broken when made, if incumbrances exist when the deed is delivered.—Dahl v Stakke, N. Dak., 96 N. W. Rep. 358.

52. CRIMINAL TRIAL—Bank Account.—In a prosecution for homicide, evidence as to the amount of defendant's bank account at the time of the homicide held admissible on the issue of motive.—State v. Mortensen, Utah, 73 Pac. Rep. 562.

53. CRIMINAL TRIAL—Expert Testimony.—In a prosecution for homicide, expert evidence of a physician as to the probable length of time which elapsed between the time deceased ate his last meal and the time of his death held admissible.—State v. Mortensen, Utah, 73 Pac. Rep. 562.

54. CRIMINAL TRIAL—Question of Issue.—Where the accused is making a rambling statement, it is not error to admonish him to come as speedily as possible to the question at issue.—Long v. State, Ga., 45 S. E. Rep 416.

55. CRIMINAL TRIAL—Reading Law to Jury.—In a criminal case, counsel may read law to the jury, with so much of the facts as is necessary to illustrate the principle.—Cribb v. State, Ga., 45 S. E. Rep. 396.

56. CRIMINAL TRIAL — Statement of Accused. — After counsel for both parties had announced that the case was closed and the witnesses were excused, held not error to refuse to allow accused to make a statement to the jury.—Dunwoody v. State, Ga., 45 S. E. Rep. 412.

57. CUSTOMS AND USAGES—Contract. — In the absence of proof that a custom prevailing in a city was known to a nonresident, such custom cannot be held by implication a part of a contract entered into between a citizen of such city and such nonresident. — McCall v. Herring, Ga., 45 S. E. Rep. 442.

58. CUSTOMS DUTIES—Treaty. — Goods shipped from the Philippine Islands prior to April 11, 1899, when the treaty of cession took effect, but which did not arrive at a port of entry in the United States until after that date, were not subject to duty.—American Sugar Refining Co. v. Bidwell, U. S. C. C., S. D. N. Y., 124 Fed. Rep. 677.

59. DEEDS — Construction. — A deed attempting to vest a life estate in the grantor, remainder to others in fee, held an ineffectual attempt to limit a fee after a fee simple, and to vest a fee in a grantee.—Gray v. Hawkins, N. Car., 45 S. E. Rep. 363.

60. DESCENT AND DISTRIBUTION—Advancements.—The true meaning of "advancements" is giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the parent dying intestate.—Waldron v. Taylor, W. Va., 45 S. E. Rep. 336.

61. ESCROW — Conversion by Custodian. — Where the custodian of property deposited in escrow refuses to deliver the same to the party entitled thereto on legal demand, and contests an action for its conversion on behalf of the other party to the agreement, the plaintiff is entitled to recover as damages, in addition to the value of the property, a sum equal to interest thereon from the date of conversion.—Clarke v. Eureka County Bank, U. S. C. C., D. Nev., 123 Fed. Rep. 922.

62. ESTOPPEL — Admission. — An admission by the holder of the legal title to land that he had verbally authorized another to sell the land is an estoppel in favor of one claiming under the person to whom the authority was given.—Northington v. Granada, Ga., 45 S. E. Rep. 447.

63. EVIDENCE—Admissions of Principals. — Admission of a servant, the principal in an employee's bond, as to matters relating to his duties while engaged in their discharge, is competent against the surety on his bond.—Guarantee Co. of North America v. Phenix Ins. Co., U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 170.

64. EVIDENCE—Contradiction. — The record of a court may not be contradicted by a letter of the judge thereof. —Bent v. Stone, Mass., 68 N. E. Rep. 46.

65. EVIDENCE — Lost Deed.—There was no abuse of discretion in refusing to admit a certified copy from the registry of a recorded deed, when the showing as to the loss of the original was defective. — Cox v. McDonald, Ga., 45 S. E. Rep. 401.

66. EVIDENCE—Res Gestæ.—A conversation, some 20 minutes after the execution of a will, between testator and a subscribing witness, in the absence of the other subscribing witness, held not admissible as part of the *res gestæ*.—Davidson v. Davidson, Neb., 96 N. W. Rep. 409.

67. EXECUTION — Forthcoming Bond.—Where claimant gives the levying officer a forthcoming bond, and thereafter the same officer sells the property under a superior lien, the maker of the forthcoming bond is not liable for failure to produce the property. — Floyd v. Cook, Ga., 45 S. E. Rep. 441.

68. EXECUTORS AND ADMINISTRATORS — Contract with Heir. — Where by contract with the heir an administrator purchases the heir's interest in the real estate, if the transaction is in good faith it may be treated as a similar transaction between strangers. — Shelby v. Creighton, Neb , 96 N. W. Rep. 382.

69. EXECUTORS AND ADMINISTRATORS — Widow's Allowance.—A widow is not entitled to a homestead and a year's supply, where the aggregate exceeds the amount which may be set apart as a homestead and exemption.— Green v. Hambrick, Ga., 45 S. E. Rep. 420.

70. FEDERAL COURTS — Jurisdiction. — A federal court has jurisdiction to determine the right to the proceeds of a judgment rendered therein which has been paid into court, as between different claimants who appear and assert their claims, regardless of their citizenship.— Myers v. Luzerne County, U. S. C. C., M. D., Pa. 124 Fed. Rep. 436.

71. FEDERAL COURTS — Jurisdiction. — A federal court has jurisdiction of a suit to modify and correct one of its own decrees, without regard to the citizenship of the parties, and, as incidental to such relief, to grant an injunction to restrain a party from acting upon the decree as originally entered. — Thompson v. Schenectady Ry. Co., U. S. C. C., N. D. N. Y., 124 Fed. Rep. 274.

72. FEDERAL COURTS—Rule Regulating Evidence. — A state statute regulating evidence in criminal cases has no application to prosecutions in federal courts which in the absence of a federal statute are governed by the rules of the common law. — Hanley v. United States, U. S. C. C. of App., Second Circuit, 123 Fed. Rep. 849.

73. FIRE INSURANCE—Assignment.—That an adjudication in bankruptcy was based on the fact that an assignment of an insurance policy to a creditor was a preference did not authorize the trustee to ignore the assignment.—Traders' Ins. Co. v. Mann, Ga., 45 S. E. Rep. 426.

74. GARNISHMENT — Parol Gift. — Improvements made for a donee by another person on land embraced in a parol gift, pending the donee's possession and on the faith of the gift, stand upon the same footing as if they were made by the donee.—Walker v. Neil, Ga., 45 S. E. Rep. 387.

75. GUARDIAN AND WARD — Management of Estate.— Where a guardian invested his ward's funds in his own business, and lost the same, he should be charged with the amount thereof, with interest from the date of its receipt, compounded annually.—*In re* Hamilton's Estate, Cal., 73 Pac. Rep. 578.

76. HABEAS CORPUS — Contempt. — Where petitioners were imprisoned for violation of a strike injunction the only question reviewable on *habeas corpus* to secure their discharge was whether the court had jurisdiction to grant the injunction.—*Ex parte* Haggerty, U. S. C. C., N. D. W. Va., 124 Fed. Rep. 441.

77. HIGHWAYS — Prescription. — The repeated use of a strip of an open common held not to make it a public highway by prescription. — McKay v. Town of Reading, Mass., 68 N. E. Rep. 43.

78. HOMESTEAD — Election by Widow.—An election by a widow is not binding, unless made with a knowledge of the condition of the estate and all material facts connected therewith.—Green v. Hambrick, Ga., 45 S. E. Rep. 420.

79. HUSBAND AND WIFE — Evidence. — In a suit by a wife to recover money paid by her husband in settlement of his debts, evidence as to statements of the husband to the defendant that the money was his is admissible on the question of notice of the wife's ownership.— Paul v. Thompson, Ga., 45 S. E. Rep. 387.

80. INDEMNITY—Joint Tort Feasors.—Where one places a defective grating in a sidewalk, through which a pedestrian fell and recovered judgment for injuries against the city, the property owner is liable over to the city.— Schneider v. City Council of Augusta, Ga., 45 S. E. Rep. 459.

81. INDIANS — Action to Recover Lands.—In an action to recover Indian lands by an alleged heir, it would be presumed that the laws of descent of the Indian nation were the same as those of the forum, in the absence of any allegation to the contrary.—Ricknor v. Clabber, Ind. Ter., 76 S. W. Rep. 271.

82. INJUNCTION — Blacklisting Employees. — An employer has a right to blacklist employees for membership in a labor union.—Boyer v. Western Union Tel. Co. U. S. C. C., E. D. Mo., 124 Fed. Rep. 246.

83. INJUNCTION — Restraining Trespass.—Where a petition for injunction to restrain a trespass shows that the injury could be compensated in money, and the trespasser is solvent, an injunction should not be granted.—Woodstock Iron Works v. Leake, Ga., 45 S. E. Rep. 429.

84. INSOLVENCY — Set off. — In case of two insolvent estates, each indebted to the other, the dividend to one is to be set off against the dividend to the other.—Rue v. Miller, U. S. C. C. of App., Sixth Circuit, 124 Fed. Rep. 208.

85. INTEREST — Tender of Payment.—The payment of a note at its maturity at the place where the same is payable is a sufficient tender of payment to stop interest.—Chapman v. Wagner, Neb., 96 N. W. Rep. 412.

86. JUDGMENT—Service.—Where the attempted service fails to reach the party to be served in any way, a judgment founded thereon is absolutely void.—Baldwin v. Burt, Neb., 96 N. W. Rep. 401.

87. JUDICIAL SALES — Rescission. — In the absence of fiduciary relations or extraordinary circumstances, courts and their officers are as firmly bound by their executed sales as private citizens.—Files v. Brown, U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 133.

88. LARCENY — Indictment.—An information charging that defendant feloniously took from the person of the prosecutor certain property held not objectionable for failure to charge an asportation. — People v. Lonnen, Cal., 73 Pac. Rep. 586.

89. LIFE INSURANCE — Breach of Warranty. — A warranty that insured is temperate as to the use of intoxicants vitiates the policy only in case he is addicted to periodical and habitual excessive indulgences.—Holtum v. Germania Life Ins. Co., Cal., 73 Pac. Rep. 591.

90. LIFE INSURANCE — Suicide.—In action on a life insurance policy, held not error to charge that if insured shot himself, and at the time intended to kill himself, it would be immaterial whether at the time he was sane or insane. — Jenkins v. National Union, Ga., 45 S. E. Rep. 449.

91. MANDAMUS—Municipalities. — *Mandamus* to enforce collection of judgments of national courts against municipalities is a legal substitute for writ of execution against private parties.—United States v. Saunders, U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 124.

92. MASTER AND SERVANT—Right of Discharge.—In the absence of a contract for employment for a definite time, an employer has the right to discharge his employee without notice at any time.—Boyer v. Western Union Tel. Co., U. S. C. C., E. D. Mo., 124 Fed. Rep. 246.

93. MORTGAGES — Appraisement.—Where an appraisement for foreclosure has been duly made, it cannot be successfully attacked as too low. — Pearson v. Badger Lumber Co., Neb., 96 N. W. Rep. 493.

94. MORTGAGES — Record. — Where the record is silent as to the time of filing copies of certificate of liens on mortgage foreclosure, it will be presumed that they were duly filed.—Clark v. Wolf, Neb., 96 N. W. Rep. 495.

95. MUNICIPAL CORPORATIONS — Assignment of Contract.—An assignment of a municipal contract for public works held to transfer to the assignee the right to money retained by the city to insure performance. — Chapin v. Pike, Mass., 68 N. E. Rep. 42.

96. MUNICIPAL CORPORATIONS — Contract for Laying Conduit.—A municipal contractor held not entitled to extra compensation for laying a conduit lower than the depth specified, in the absence of a written order from the city engineer. — Johnson v. City of Albany, 83 N. Y. Supp. 1002.

97. MUNICIPAL CORPORATIONS — Defective Streets. — That the president of a city council lived near a defective street held insufficient to charge the city with notice of the defect. — Corey v. City of Ann Arbor, Mich., 96 N. W. Rep. 477.

98. MUNICIPAL CORPORATIONS — Service of Process.—Where a party is made defendant and served with process, he is charged with notice of an answer his codefendants file, only when it is filed within the time required by law.—Koehler v. Reed, Neb., 96 N. W. Rep. 380.

99. MUNICIPAL CORPORATIONS—Special Improvements. —There is no charter restriction on the power of a city to render itself generally liable on its contract for special improvements. — Pine Tree Lumber Co. v. City of Fergus, N. Dak., 96 N. W. Rep. 357.

100. MUNICIPAL CORPORATIONS—Street Improvement Assessments. — Where two streets on two sides of a corner lot were improved, it was competent for the city to include the property in two assessment districts.—Nowlen v. City of Benton Harbor, Mich., 96 N. W. Rep. 450.

101. MUNICIPAL CORPORATIONS — Tide Water Lands.—Under a custom of the owners of lands abutting tide waters of the Mobile river, such owners held entitled to erect wharves, piers, booms, and other structures, to be used in connection with such uplands.—Sullivan Timber Co. v. City of Mobile, U. S. C. C., S. D. Ala., 124 Fed. Rep. 644.

102. NEGLIGENCE — Places Attractive to Children. — Maintenance of an unguarded canal having precipitous banks through a thickly settled portion of a town to conduct water to defendant's mills was not negligence sufficient to sustain a recovery for the death of a child drowned while playing near the same. — McCabe v. American Woolen Co , U. S. C. C., D. Mass., 124 Fed. Rep. 283.

103. NEGLIGENCE — Proximate Cause. — An injury that could not have been reasonably anticipated as the probable result of an act of negligence is not actionable, and is either the remote cause, or no cause of the injury.—Cole v. German Savings & Loan Soc., U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 113.

104. PARTNERSHIP — Sealed Instruments. — Under the law of South Carolina, a partner cannot bind his firm by a sealed obligation of conveyance, without the authority or ratification of his copartner. — Pollock v. Jones, U. S. C. C. of App , Fourth Circuit, 124 Fed. Rep. 163.

105. PARTNERSHIP—What Constitutes.—Where A, having a contract to grade a railroad, contracted with B to put in mules, etc., against A's mules and services for one-half of the net profits, there was a partnership as to third parties —Brandon & Dreyer v. Conner, Ga., 45 S. E. Rep. 371.

106. PATENTS — Infringement. — A preliminary injunction against infringement will not be granted, when defendant is responsible, and substantial doubt of his infringement exists, or where the complainant's right is doubtful.—Hallock v. Babcock Mfg. Co., U. S. C. C., N. D. N. Y., 124 Fed. Rep. 226.

107. PAYMENT — Note. — In an action on a note, a plea that it had been paid by a sale of merchandise, and also that at the date of the suit by the plaintiff against the defendant the items were still due, was a plea of set-off, and not of payment.—Northington v. Granade, Ga., 45 S. E. Rep. 447.

108. PERJURY — Teacher's Monthly Report.—A teacher may be indicted for falsely swearing to a monthly report made by him to the county school commissioner for the purpose of participating in a public school fund.—Thompson v. State, Ga , 45 S. E Rep. 410.

109. PLEADING — Motion to Dismiss.—Failure to renew a motion to dismiss a case for want of facts, denied with leave at the opening, held to constitute a waiver of the objections. — Johnson v. City of Albany, 83 N. Y. Supp. 1002.

110. PRINCIPAL AND AGENT — Negligence. — Where an agent has authority to employ a subagent, he is not liable for the negligence of the subagent, if due care has been used in his selection —Morris v. Warlick, Ga., 45 S. E. Rep. 407.

111. RAILROADS — Obstructing Track.—To place on the rails iron of sufficient size to derail a passenger car is to obstruct the track, within Pen. Code, § 520.—Sanders v. State, Ga., 45 S. E. Rep. 365.

112. RECEIVERS — Parties.—In an ancillary suit in another district for the confirmation of the appointment of a receiver for a corporation by a federal court in the state of its domicile, subsidiary corporations of the state in which the ancillary suit was brought held necessary parties. — Conklin v. United States Shipbuilding Co., U. S. C. C., D. Me., 123 Fed. Rep. 913.

113. REFORMATION OF INSTRUMENTS — Heir's Sale of Interest. — Where a contract by an heir with an administrator for the sale of his interest is made to convey more than was intended, equity may reform the contract.—Shelby v. Creighton, Neb., 96 N. W. Rep. 382.

114. REMOVAL OF CAUSES — Federal Courts.—To give a federal court jurisdiction of a cause on removal, all facts essential to the jurisdiction and to the right of removal must affirmatively appear from the petition or the accompanying record.—Wilson v. Giberson, U. S. C. C., W. D. Ark., 124 Fed. Rep. 701.

115. REMOVAL OF CAUSES — Separable Controversy.—Whether or not an action presents a separable controversy between plaintiff and one of two or more defendants which entitles such defendant to remove the cause is to be determined from the allegations of the complaint alone, and cannot be shown by averments in the petition for removal.—Fogarty v. Southern Pac. Co., U. S. C. C., S. D. Cal., 123 Fed. Rep. 973.

116. SALES—Damages for Breach.—A purchaser of personal property under a pledge of warranty may retain the property and recover the difference in its value, or return the property and recover the price. — Sloan v. Wolf Co., U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 196.

117. SALES—Good Will.—In a suit for an alleged breach of contract of sale, the good will cannot be recovered for as an element of damage. — Paxton & Gallagher v. Vadbouker, Neb., 96 N. W. Rep. 378.

118. SALES — Necessity of Demand. — In trover by a vendor, claiming title under a conditional bill of sale, no demand was necessary, where defendant was in possession, claiming title, at the time of the action.—Scarboro v. Goethe, Ga., 45 S. E. Rep. 413.

119. SALES — New Contract. — A new contract for the purchase and sale of the same articles, when fully executed, may be a satisfaction of a former agreement as to such sale. — Poland Paper Co. v. Foote & Davies Co., Ga., 45 S. E. Rep. 374.

120 SET-OFF AND COUNTERCLAIM — When Allowed.—One indebted to a bank may purchase a claim due by it and use it as a set-off, when subsequently sued by the bank.—Nix v. Ellis, Ga., 45 S. E. Rep. 404.

121. SHIPPING — Injury to Passenger. — The running down and trampling upon a passenger of a steamboat by his fellow passengers is not a consequence to be reasonably anticipated by the striking of the steamboat against the pier of a drawbridge.—Southern Transp. Co. v. Harper, Ga., 45 S. E. Rep. 458.

122. STATUTES — Constitutionality. — A statute for the preservation of both fish and game contains but one subject, and is not unconstitutional.—Ah King v. Superior Court, Cal., 73 Pac. Rep. 587.

123. STREET RAILROADS — Enjoining Construction.—To a suit by property owners on a street to prevent the construction of a street railroad thereon, other property owners who consented to such building are not necessary parties. — Thompson v. Schenectady Ry. Co., U. S. C. C., N. D. N. Y., 124 Fed Rep. 274.

124. STREET RAILROADS — Right to Operate Cars in Either Direction on Either Track.—In operating a double track railroad, the owner is bound by no rule requiring him to use the right-hand track for running cars in one direction and the left-hand track for running cars in the reverse direction; but may run cars on both tracks, in either direction, as the needs of the business may require.—Stewart v. Great Falls Electric Ry. Co., Dist. of Col. App., 31 Wash. Law Rep. 748.

125. SUBROGATION—Volunteer.—Where plaintiff loaned money on a mortgage to pay off a prior mortgage, and his mortgage proved invalid, he was not a mere volunteer, so that the heirs of the mortgagor could avoid his mortgage and retain the benefit of the release of the prior lien.—Gordon v. Stewart, Neb., 96 N. W. Rep. 624.

126. SUBSCRIPTIONS — Conditions. — The condition of a subscription to a church that it should be for the establishment of a certain congregation, not having been performed, the subscriber was not liable. — Leland Norwegian Lutheran Congregation, Winnebago County v. Larson, Iowa, 96 N. W. Rep. 706.

127. TAXATION—Cash on Hand.—If, on the day for listing taxes, an officer of the federal government has on hand cash derived from his salary received from the government, the same is taxable *ad valorem*.—Purnell v. Page, N. Car., 45 S. E. Rep. 534.

128. TAXATION—Collateral Inheritance Tax.—Estate of heir of nonresident estate domiciled in the state held liable to the collateral inheritance tax. — *In re* Milliken's Estate, Pa., 55 Atl. Rep. 853.

129. TENDER — Condition. — Where a tender is accompanied by a condition, and the party rejects the tender on the ground that it is insufficient, the condition does not vitiate the tender.—Clark v. Colfax County, Neb., 96 N. W. Rep. 607.

130. TRADEMARKS AND TRADENAMES—Family Name.—Where a family name has become a trademark applied to a manufactured article, the right to use such name alone, without other distinguishing characters, does not accrue to descendants of the original manufacturer of the same name.—Von Faber v. Faber, U. S. C. C., S. D. N. Y., 124 Fed. Rep. 603.

131. TRADEMARKS AND TRADENAMES — Fraud. — Mere statements of opinion as to the curative properties of a compound, or as to the cause of a disease concerning which there is a conflict of opinion, are not false representations, within the rule that one deceiving the public by false representations cannot enforce his trademark. —Newbro v. Undeland, Neb., 96 N. W. Rep. 635.

132. TRADEMARKS AND TRADENAMES — Similarity of Labels. — Conformity between labels is not excused by ability to point out differences, where the ensemble is sufficient to mislead ordinary purchasers. — Cantrell & Cochrane v. Butler, U. S. C. C., S. D. N. Y., 124 Fed. Rep. 290.

133. TREATIES — Ratification.—The exchange of ratifications of a treaty with a foreign government is an essential part of the transaction to render the treaty effective. — Armstrong v. Bidwell, U. S. C. C., S. D. N. Y., 124 Fed. Rep. 690.

134. TRESPASS—Cutting and Removing Timber.—Damages committed by a trespasser on land in cutting and removing timber therefrom are personal to the owner and do not pass to his grantees. — Drake v. Howell, N. Car., 45 S. E. Rep. 589.

135. TRIAL—Attorney as Witness.—A court rule prohibiting an attorney from arguing the case to the jury where he has offered himself as a witness held not in contravention of 2 Ballinger's Ann. Codes & St. § 4998, subd. 5.—Voss v. Bender, Wash., 73 Pac. Rep. 697.

136. TRIAL — Cross-Examination. — Refusal to permit defendant to introduce answers to interrogatories taken, as a part of plaintiff's cross-examination, before plaintiff had rested, except for purposes of contradiction, held not error.—Wilson v. Hoffman, U. S. C. C., D. N. J., 123 Fed. Rep. 964.

137. TRIAL—Dispersal of Jury.—Where a jury has retired, they should not without consent, be permitted to disperse until a verdict has been received in open court of the case withdrawn from their consideration.—Prescott v. City Council of Augusta, Ga., 45 S. E. Rep. 431.

138. TRIAL—Evidence.—A charge which applies to the facts of a case the rules of law which govern the issues, and states the questions which the jury must answer, is more useful than abstract propositions. — Frizzell v. Omaha St. Ry. Co., U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 176.

139. TRIAL—Mutual Indebtedness.—Though defendant may in his plea have admitted a *prima facie* case for plaintiff, yet where he allows plaintiff to introduce evidence, without claiming the right to open and close, he waives it.—Northington v. Granade, Ga., 45 S. E. Rep. 447.

140. TRIAL — Paupers.—In a prosecution of keeper of a county house for illegally removing a county pauper to another county, it was no defense that such removal had been ordered by the superintendents of the poor.—People v. Barlow, Mich., 96 N. W. Rep. 482.

141. TRUSTS — Fraud. — Where a person obtains the legal title to the land of another by means of fraud, equity will fasten a constructive trust on the property.—Pollard v. McKenney, Neb., 96 N. W. Rep. 679.

142. TRUSTS — Rents and Profits.—Where a trustee of a married woman had no right to prevent her from receiving the rents and profits during her husband's life, he was not liable for rents and profits received by the husband.—Perkins v. Brinkley, N. Car., 45 S. E. Rep. 541.

143. TRUSTS — Statute of Frauds. — Facts held to show a trust by construction, to which the statute of frauds does not apply.—Ackley v. Croucher, Ill., 68 N. E. Rep. 86.

144. UNITED STATES—Debts Due.—The United States is not entitled, under Rev. St. §§ 3466-3468, to priority of payment against the surety of a debtor.—United States v. Heaton, U. S. C. C., E. D. Pa., 124 Fed. Rep. 699.

145. USURY—Commissions.—Where no more than the legal rate of interest is reserved on a loan, that the lender's agent charged the borrower a commission will not render the transaction usurious —McCall v. Herring, Ga., 45 S. E. Rep. 442.

146. VENDOR AND PURCHASER—Failure of Consideration.—The defense of failure of consideration arising from the breach of a covenant against incumbrances may be interposed in an action on a purchase money note, though the maker thereof has remained in continuous possession of the premises sold.—Dahl v. Stakke, N. Dak., 96 N. W. Rep. 353.

147. VENDOR AND PURCHASER—Husband and Wife.—Residence by a husband and wife on land which the wife claims, and in which the husband claims no interest, is notice of whatever interest the wife has therein. — Walker v. Neil, Ga., 45 S. E. Rep. 387.

148. VENUE—Divorce.—The word "business," in Const. art. 8, § 5, construed to mean cause of action, and not to apply to any cause which did not involve a trial, and is not subject to a change of venue.—Gibbs v. Gibbs, Utah, 73 Pac. Rep. 641.

149. WAR — Martial Law. — Calling out militia to suppress violence in a district affected by a strike held a qualified declaration of martial law.—Commonwealth v. Shortall, Pa., 55 Atl. Rep. 852.

150. WARRANTIES — Burden of Proof. — It is the legal duty of defendant to test the capacity of the thing bought in a fair and reasonable manner and within a reasonable time; and having thus demonstrated its failure, to notify the plaintiff to remove it and replace the former setting. — Purity Ice Co. v. Hawley Down Draft Furnace Co., Dist. of Col. App., 31 Wash. Law Rep. 742.

151. WATERS AND WATER COURSES—Diversion.—A decree settling water rights between conflicting claimants held unsustainable, where the evidence fails to specify the amount of water necessary for their use.—Lost Creek Irr. Co. v. Rex, Utah, 73 Pac. Rep. 660.

152. WATERS AND WATER COURSES — Nonpayment of Water Rates.—A charge imposed by a water commissioner of New York City for nonpayment of water rates under its rules is a penalty recoverable only after determination thereof by due process of law. — People v. Monroe, 88 N. Y. Supp. 995.

153. WILLS — Allowance of Counsel Fees Improper. — Where a paper purporting to be the last will of a decedent is propounded for probate by the executor named therein, and a *caveat* is filed charging that its execution was procured by undue influence exercised upon the testator by the person named as executor and by other persons, the probate court is without jurisdiction, before a trial of the issues has been had and the good faith of the executor established, to authorize the executor to employ counsel and direct the payment by collectors appointed to take charge of the estate pending the controversy of a retaining fee to such counsel.—Kengla v. Randall, Dist. of Col. App., 31 Wash. Law Rep. 695.

154. WILLS — Claims —Where an executrix and residuary legatee gave a bond to pay debts and legacies, an action by a creditor against her held not barred by limitation until six years after the giving of such bond.—Pym v. Pym, Wis., 96 N. W. Rep. 429.

155. WILLS—Construction.—When there is a devise to one, remainder over direct to others, nothing appearing in the will to the contrary, the legal presumption is that the testator intended to create a vested estate in remainder in the common-law sense.—*In re* Moran's Will, Wis., 96 N. W. Rep. 367.

156. WILLS—Construction.—The use of words in a will in relation to personalty which, if applied to land, would create an estate tail, makes the gift absolute in the first taker.—*In re* Tillinghast's Account, R. I., 55 Atl. Rep. 879.

157. WILLS — Estate Devised. — A devise of the remainder of testator's estate to his son on condition of paying certain charges, and after the death of the son to the testator's next of kin, held a devise of a life estate in such remainder only.—*In re* Willis' Will, R. I., 55 Atl. Rep. 889.

158. WILLS—Fiduciary Relation.—An executor held under no fiduciary duty to a legatee to inform her as to the value of corporate stock bequeathed to her, which he purchased at her solicitation.—O'Neile v. Ternes, Wash., 73 Pac. Rep. 692.

159. WILLS—Specific Performance.—An agreement to leave property by will is not revocable after performance on the part of the promisee.—Best v. Grolapp, Neb., 6 N. W. Rep. 641.

160. WILLS—Supposed Wife.—A will in favor of testator's supposed wife held not void on the ground of her fraud, though she had a former husband still living.—*In re* Dries' Will, N. J., 55 Atl. Rep. 814.

161. WILLS—Undue Influence.—In the absence of independent proof of undue influence, declarations of testator after the execution of the will are inadmissible.—Davidson v. Davidson, Neb., 96 N. W. Rep. 409.

162. WITNESSES—Absence of Defendant. — Where, in a prosecution for murder, defendant objected to accompanying the jury on a view, the court would not be justified in compelling him to do so.—State v. Mortensen Utah, 73 Pac. Rep. 562.

163. WITNESSES—Cross Examination. — Where a witness has testified in general as to matters material to the issue, he was properly cross examined in regard thereto. —Blauvelt v. Delaware, L. & W. R. Co., Pa., 55 Atl. Rep, 857.

164. WITNESSES—Elevator Shaft.—In an action by customer for injuries by falling through elevator shaft in store, defendant can be asked on cross-examination whether other persons had not fallen down the shaft.—Reid v. Linck, Pa., 55 Atl. Rep. 849.

165. WITNESSES—Evidence.—It was not error to admit evidence that the accused was forced to make a track in the earth, when no evidence was admitted to show the appearance of the track.—Dunwoody v. State, Ga., 45 S. E. Rep. 412.

166. WITNESSES—Evidence.—Where plaintiff testified to the value of tools alleged to have been converted, defendant was entitled on cross-examination to ask him the value of certain of the tools shown him.—Lemon v. McBride, Mich., 96 N. W. Rep. 453.

167. WITNESSES — Impeachment. — Statements of witnesses inconsistent with their testimony on material issues are competent to impeach their credibility.—Chicago & N. W. Ry. Co. v. De Clow, U. S. C. C. of App., Eighth Circuit, 124 Fed. Rep. 142.